A CRITICAL ANALYSIS OF THE INHERENT JOB REQUIREMENT AS A DEFENCE AGAINST UNFAIR DISCRIMINATION

by

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LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
EEA	Employment Equity Act
EU	European Union
GG	Government Gazette
IC	Industrial Court
ILC	International Labour Conference
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
SCA	Supreme Court of Appeal
UN	United Nations

Abstract

South Africa's new constitutional dispensation came with a promise for harmonized and peaceful living in South Africa. In this era where the Constitution reigns supreme, came hope for economic emancipation for many people, especially previously disadvantaged groups of people. The Constitution which enshrines the Bill of Rights embeds fundamental human rights, including labour rights which have the power to guarantee true economic emancipation for people in employment relationships. In an employment relationship, employees are inherently weaker and must be afforded protection by the law. Unfortunately, employees still face the risk of dismissals, unfair discrimination and unfair labour practices. The Labour Relations Act and the Employment Equity Act are two of the main pieces labour legislation enacted to give effect to the rights of employees in the workplace and to regulate the employment relationship. Discrimination in South Africa remains one of the challenges plaguing the nation and the workplace is no different. Where an employee or job seeker raises a claim of unfair discrimination against the employer, the employer can also raise certain defences to justify such discrimination. This is provided for in legislation.

This study seeks to answer the question on what an inherent job requirement is and whether it is a legitimate defence against unfair discrimination. It is made up of 5 chapters which cover the introduction, a South African legal framework which includes a constitutional and legislative framework, an analysis of relevant South African case law, a comparative study looking at international and foreign law, as well as recommendations and a conclusion.

The main aim of this study is to ascertain whether the approach currently adopted in dealing with matters of unfair discrimination in the workplace where the inherent job requirements is raised as a defence is sufficient in maintaining a balancing of interests of both employers and employees. This study will find that the current approach is insufficient and will seek to propose a new approach or improved approach that meets the objectives and purpose of not the Constitution but the Labour Relations Act and the Employment Equity Act.

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Chapter 1

1.1 Research question

This minor dissertation critically examines and analyses the following question: what is the inherent job requirement and in what instances can it be used as a defence against unfair discrimination in the workplace? Can discrimination of an employee or job applicant based on listed grounds or on any other arbitrary grounds be justified if it is based on the so called 'inherent job requirement'?

1.2 Problem statement

South Africa comes from an era of division widely known as apartheid. The apartheid system was heavily characterized by institutionalized discrimination which had devastating effects on the country and shaped the political, economic and social lives of all South African people.[1]Black (also refers to Africans, Indians, and Coloureds as per the definition in the Employment Equity Act) South Africans in particular, were the most disadvantaged and marginalized by this segregatory system. The apartheid system was primarily premised on inequality and racial discrimination with the effect that non-white races enjoyed little to no protection of rights, including labour rights.[2] During this system, South Africa was identified as one of the most unequal societies in the world.[3] The defeat of apartheid and the subsequent establishment of a "new" South Africa was hailed internationally as a miracle.[4] However, the deep scars of this appalling system are still visible in the society.[5] Today, many years after the abolishment of apartheid in South Africa, there are still cases of discrimination in the workplace. Notably, our

[1] Kasika *The Defence of Inherent Requirements of the Job in Unfair Discrimination Cases* (2006 thesis SA) 1.

[2] Dupper *Essential Employment Discrimination law* (2004) 1.

[3] Chaskalson "From wickedness to equality: The moral transformation of South African law" 2003 *International Journal of Constitutional Law* 590 591.

[4] Cornell *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (2014) 1.

[5] *Brink v Kitshoff NO* 1996 4 SA 197 (CC) par 217A-C.

Constitution recognizes that the systemic racial discrimination entrenched during apartheid requires positive action to achieve results.[6]

In this constitutional dispensation where people enjoy constitutional rights, it is paramount that the rights enshrined in the Bill of Rights are seen to be manifested. The new South Africa is founded on hopes for a democratic future based on national unity, reconciliation, a commitment to restructuring, development, human rights and equality.[7] Part of this development and establishment of equality means centralizing labour rights. Our Constitution[8] recognises labour rights in section 23 and affords Constitutional protection to such rights. The section guarantees the right to fair labour practices and that such right is implied into every aspect of the employment relationship. The employment relationship is an inherently unequal one that requires a constant balancing of interests that can be influenced by public policy. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it.[9] It can be said that public policy is a product of constitutional values and purports the notions of reasonableness, fairness and justice.[10]Human dignity, Equality and Freedom are the founding values of our Constitution and are all connected to labour rights.

The constitution also strictly forbids any form of discrimination. Section 9 of the Constitution[11]states;

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

[6] *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) par 74.

[7] Kentridge "Introducing the right to equality in the interim Constitution" 1994 *South African Journal on Human Rights* 149 150.

[8] The Constitution of the Republic of South Africa, 1996.

[9] *Barkhuizen v Napier* 2007 5 SA 323 (CC) par 28.

[10] Cornell (n 4) 73.

[11] This section is generally accepted as the equality clause.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection

(3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[12]

The section promotes equal treatment of all people including people in employment relationships and prohibits discrimination based on specific and other grounds. It also instructs parliament to enact legislation that will ensure such prohibition. Although there are various pieces of labour legislation dealing with different labour matters including the Labour Relations Act (LRA)[13] which is the primary source, the Employment Equity Act (EEA)[14] specifically regulates the issue of discrimination in the workplace. The Act also applies to job-seeking applicants and purports to achieve equity in the workplace through eliminating discrimination and promoting equal opportunity and fair treatment in the workplace.[15]Although the Act affords this anti-discrimination protection to employees, it also gives the employers certain defences and justifications where a claim of unfair discrimination arises against them.

An employer can utilize the defence of an inherent job requirement in the case of an unfair discrimination claim both in terms of the LRA and the EEA. However, the inherent job requirement is not defined in the Acts and defence is narrow in that it only looks at the essential

[12] s 9(1)-(5) of the Constitution.

[13] 66 of 1995.

[14] 55 of 1998.

[15] s 2 of the Employment Equity Act.

duties of a particular job. Additionally, there is barely sufficient case law where this defence has been used.

1.3 Research aims and synopsis

The objective of this minor dissertation is to evaluate and consider the insufficiencies of the statutory provisions dealing with the inherent job requirement as a defence in unfair discrimination claims by employees or job seeking applicants in South Africa. The dissertation will seek to analyse how the courts deal with cases where the inherent job requirement defense is used as well as examine if there is a general test found in legislation or coined by the courts to determine the basis and extent of the defence. In the absence of such a test, this dissertation will seek to fashion one. This dissertation will also consider inputs from the International Labour Organisation (ILO)[16] as well as look at the regulations with regards to a similar defence in Australia.

This minor dissertation aims to achieve the following research outcomes:

1. To provide an overview and understanding of the regulatory provisions relevant to discrimination in the workplace and instances where such discrimination is unfair as well as examine the defences (particularly the inherent job requirement defence) available to an employer where unfair discrimination is alleged.
2. to evaluate and analyse different South African cases where the courts dealt with the inherent job requirement defence.
3. to establish a test for determining what constitutes an inherent job requirement and in what instance it can be used
4. to look for lessons from international and foreign law through a comparative study.

1.4 Research methodology

This dissertation will be based on a doctrinal analysis comprising of analysis of legislation, case law and secondary sources of law. It will also comprise of comparative research.

[16] South Africa is a member state and has ratified all its core conventions.

1.5 Limitations of research

For purposes of this minor dissertations, the research will be limited to only the inherent job requirement as a defence against unfair discrimination and will not focus on affirmative action as a defence. Only three South African cases will be studied in depth in this regard due to space constraints. The comparative chapter will briefly look at ILO provisions and will only focus on Australian foreign law, to the exclusion of any legal provisions found in the United Kingdom, the United States of America, Canada and any other foreign jurisdiction.

1.6 Chapter outlines

Chapter 1 sets the background to the research of this minor dissertation. It provides a research question in which it will attempt to answer. The chapter also sets out the problem statement and outlines the aims and synopsis of the research topic. Lastly, the chapter deals with the research methodology adopted as well as the limitations of the study.

Chapter 2 deals with the legal framework relating to the topic of the minor dissertation by looking at the relevant constitutional and legislative provisions in South Africa. The chapter is intended to scrutinize the labour law framework in the South African context by focusing on two key Acts as well as examine the scope of the inherent job requirements within employment relations. This chapter will look at discrimination both within a general lens and within the labour law context.

Chapter 3 contains an analysis of case law dealing with the inherent job requirements in discrimination cases in South Africa. This chapter looks at how the courts interpret and deal with such cases and the test adopted by the courts in this regard.

Chapter 4 comprises of a comparative study and will look at the ILO provisions relating to the research topic. The study will look at the constitutional obligations where international and foreignlaw is concerned. Furthermore, the chapter will look at the regulations in Australia with special emphasis on the Australian case law dealing with the inherent job requirements as a defence against a claim for unfair discrimination.

Chapter 5 contains the conclusion and recommendations of the dissertation by proposing a test to be adopted in unfair discrimination cases in the workplace as well as calls for the amendment of certain provisions in the labour legislation.

Chapter 2

The South African labour relations is grounded in complex history that must be evaluated from a political and socio-economic spectrum. As it stands, the nature and extent of the regulation of the labour market and work in general remains an issue of political contention.[17] The characteristics of inequality in the country continue to be replicated in the labour market.[18]This chapter however, will not look deeply into such history nor will it provide a critical analysis of the historical milestones in labour law. This chapter will provide an outline of legislation, specifically the EEA and the LRA. It will also outline the constitutional framework relating to discrimination, particularly in the workplace as well discuss the concept of equality within the South African legal framework.

2.1 *The Constitutional framework*

2.1.1 The interim Constitution

The concept of equality has been a central focus of South African law since the advent of the interim Constitution.[19]Section 8 of the interim Constitution[20]enshrined an equality provision that specifically prohibited unfair discrimination on certain grounds.[21] It also contained a promise that the law would not only safeguard the people of South Africa, but that it would benefit them equally. Much like the current Constitution, the interim Constitution prohibited unfair discrimination, whether direct or indirect on any person based on one or a combination of grounds such as race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.[22]

[17] Christianson, McGregor and van Eck *Law@Work* (4th ed) 3.

[18] Based on the ILO's 1992 country review conducted.

[19] Thompson, Benjamin, Duppers and Garbers *South African Labour Law* (1965) 9.

[20] The Constitution of South Africa 200 of 1993.

[21] s 8(2) of the interim Constitution.

[22] These are similar grounds to those found in s 9(3) of the 1996 Constitution. See also n 6 above.

It is against this background that the Industrial Court dealt with numerous cases of discrimination claims. The court in this regard would often find it difficult to tackle the claims of discrimination and in the context of employment and therefore opted to render the claims as unfair labour practices. In *Association of Professional Teachers and Another v Minister of Education*[23]the Industrial Court found that a policy in which the Public Service Code provided that subsidized housing could only be granted to legally married women in the case where the husband was medically unwell to be in a paid employment relationship amounted to direct discrimination against a class of women. This was discrimination based on sex and marital status, however, the court upheld that although there was existence of discrimination, it only amounted to unfair labour practices. Although the Industrial Court's powers were limited in that it could not hear constitutional matters, it nevertheless paid attention to s 35(3) of the interim Constitution which required courts to have due regard to the spirit, purport and objects of the chapter on fundamental rights when interpreting, developing and applying the law.[24]

2.1.2 The 1996 Constitution

Since 1993/4 South Africa has been characterized by comprehensive political, constitutional and socio-economic transformation and change.[25] The constitutional dispensation is premised on principles such as freedom of speech and association, freedom to assemble and respect for life and property, as well as maintaining civilized standards and discipline.[26] The 1996 Constitution was adopted in May 1996 and came into effect in February 1997 as the successor of the interim Constitution. In terms of its preamble, this Constitution is the supreme law of the Republic[27] and

[23] 1995 16 ILJ 1048 (IC). See also *George v Western Cape Education Department* 1995 16 ILJ 1529 (IC).

[24] Dupper (n 2) 12.

[25] Le Roux "Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure*"* 2002 *Journal of Public Administration* 418.

[26] n 13 above.

[27] See also s 2 of the Constitution which states that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

it purports to improve the quality of life of all citizens and free the potential of each person. In recognizing constitutional supremacy, the court in *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of the President of the RSA*[28] recognized that there are no two systems of law each dealing with its own issue, but that there is only one system of law shaped by the Constitution as the supreme law. In this regard, the court held that all law, including common was under constitutional control. The Constitution also recognizes key values in section 1 in terms of which the country as a sovereign and democratic state is founded upon. The core values include human dignity, equality and freedom. In s 1(b), non-racialism and non-sexism are recognized as founding values of the Constitution. This section immediately outlines the idea of anti-discrimination that is promoted by the Constitution in section 9.

Our Constitution values equality both as a right and a founding principle of our Constitutional democracy. Section 9 of the Constitution promotes the notion of equality and prohibits discrimination based on listed and unlisted grounds however, the provision also places a positive duty on the state to act in order to ensure that everyone enjoys these rights and freedoms. This provision in the Constitution is important in the discussion of inherent job requirements in the workplace because some of these requirements can amount to discrimination. However, this will be explored later in the paper.

The concept of equality needs to be investigated further. It is important to consider whether, to support our constitutional democratic vision, we need to follow a formalistic or substantive approach to the concept of equality. Formal equality requires that persons who are in the same position should be treated the same and that people should not be treated different because of their religion, race or gender.[29] It therefore presupposes that all people are equal bearers of rights. In this regard, inequality is an irregularity that can be eliminated by extending the same rights and entitlements to all persons according to the same neutral standard of measurement.[30]Substantive equality on the other hand, ensures that laws and policies do not reinforce the subordination of people or groups of people already subjected to political, social or economic disadvantage by

[28] 2000 2 SA 674 (CC) par 44.

[29] Smith "Equality constitutional adjudication in South Africa" 2014 *African Human Rights Law Journal* 609 611.

[30] De Waal, Curries and Erasmus *The Bill of Rights Handbook* (2000).

requiring law to treat people as substantive equals and accommodating their differences.[31]Substantive equality considers remedial and restitutionary elements.[32]It is therefore not blind to the social and economic differences between people.

Arguably, s 9(2) of the Constitution indicates that substantive equality is envisaged by the Constitution. Firstly, it declares that equality includes the full and equal enjoyment of rights and freedoms and secondly, it clarifies that affirmative action is not considered as an exception to a formal idea of equality.[33] Formal equality as we understand it, does not take into account the socio-economic differences between people while substantive equality focuses on the effects of a particular rule as opposed to the form it assumes. *President of the Republic of South Africa v Hugo*[34] recognized that treating people identically, and thereby following a formal equality notion can often result in inequality. In this regard, the court stated that although the long-term goal of our constitution is to achieve equal treatment of people, insisting on equal treatment where inequality has been established may result in the entrenchment of that inequality.

The Constitution seeks to promote the advancement of human rights and freedoms and this includes labour rights. In terms of s 13 of the Constitution, no one may be subjected to slavery, servitude and forced labour. This section gives the idea that labour rights are fundamental human rights and that there exists a strong link between labour rights and human dignity. There are other sections in the Constitution that are related to labour rights including s 17 which states that everyone has the right to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner. This section in the labour context has allowed employees to act where they have grievances by following the relevant guidelines. Section 18 grants everyone the right to freedom of association, which includes the right to join trade unions and engage in collective bargaining where labour matters are concerned. Section 22 further states that every citizen has the right to choose their trade, occupation or profession freely and that such trade, profession or practice may

[31] Le Roux (n 26) 420.

[32] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 60.

[33] Dupper et al (n 2 above).

[34] 1997 4 SA 1 (CC).

be regulated by law. All these provisions are relevant in informing labour relations in the South African context.

One of the most relevant provisions relating to labour rights is s 23 of the Constitution. Section 23(1) states that veryone has the right to fair labour practices. The section prohibits unfair labour practices and gives birth to labour legislation such as the Labour Relations Act, The Employment Equity Act, the Basic Conditions of Employment Act and other relevant pieces of legislation, including those touching on labour and social security which have shaped the South African labour relations. This section provides a broader protection of labour rights than that found in legislation which tends to be narrow and specific to employees. The use of the word "everyone" for example, tells us that the section intended to provide protection to people in a work relationship that is akin to an employment relationship. Furthermore, the protection provided under the section is not limited to individuals but is wide enough to include collective relationships. Section 23(1) also dives into concept of unfairness within the scope of labour law. The section prohibits unfair labour practices while at the same time, although not expressly, promotes the principle of fairness. We know from our labour legislation that the concept of fairness plays a massive role in the protection of labour rights. For example, the LRA prohibits unfair dismissals while the EEA prohibits unfair discrimination.

2.2 *The legislative framework*

It is a basic tenet and rule of our law that we cannot bypass national legislation and rely directly on the Constitution in reaching a legal decision.[35]This is known as the principle of subsidiarity. In *NAPTOSA v Minister of Education, Western Cape*,[36] the Constitutional Court confirmed this principle and held that where legislation is enacted to give effect to a right, a litigant may not bypass such legislation. Within the labour law framework, this principle would require us to refer

[35] Henrico "Subverting PAJA in judicial review: the cause of much uncertainty in South African administrative law" 2018 *Journal of South Africa* 288 289.

[36] 2001 2 SA 112 (C); See also *Minister of Health v New Clicks SA (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 2 SA 311 (CC).

to the LRA in enforcing the rights under s 23 of the Constitution. Similarly, we would look at the EEA to enforce s 9 rights under the Constitution. In *South African National Defence Union v Minister of Defense* [37] the court held that where legislation had been enacted to give effect to a constitutional right, that legislation must form the basis for any action to claim protection in terms of that right. However, where there is no remedy in terms of the legislation, the Constitution is always a point of reference. In this instance, a constitutional right can be directly relied upon in a situation where it is simultaneously alleged to be inadequate to protect that right. This means that where a person wants to raise a claim based on the rights under s 23 of the Constitution, they must look at the LRA and the EEA for remedies unless the constitutionality of the legislation is in question or being challenged.[38]

2.2.1 The Labour Relations Act

At the time when the previous 1956 LRA was operative, employers had the right not to appoint a person on the basis of, for example, their race, gender or their trade membership.[39] Additionally, job seeking applicants had no remedies in cases where they had been unfairly discriminated. This position, however, has since changed in new legislation. Some legislative provisions also promoted unfair discrimination, for example, the Industrial Conciliation Act[40] provided for a system of job reservation where the state had the power to reserve certain jobs for white employees. There existed no legislation that prohibited discrimination of racial or sexual form in the workplace. After the 1973 Durban strikes and the 1976 Soweto uprising, the government set up the Wiehahn Commission to look at industrial relations in the country.[41]After two years, the commission made recommendations that the Labour Relations Act be amended in respect to granting of Black trade unions legal recognition.

[37] 2007 28 ILJ 1909 (CC) par 51.

[38] Grogan *Employment Rights* (2010) 5.

[39] Labour Relations Act 28 of 1956.

[40] 28 of 1956.

[41] http:www.sahistory.org.za/dated-event/wiehahn-commision-report-tabled-parliament (14-10-2019).

In 1993, at the advent of the Constitutional dispensation, equality became a central focus in the law. Even with this, labour legislation still did not contain specific provisions that prohibited discrimination. In 1994, when the newly democratically elected Minister of labour was appointed, the minister put forward a five-year programme of Action to restructure the country's labour department. The 1995 Labour Relations Act became the center of this five-year plan to reform South Africa's labour legislation. Other legislation followed the enactment of the 1995 LRA, these include the Basic Conditions of Employment Act (BCEA) [42]in 1997 and the Employment Equity Act (EEA)[43] in 1998.

The new LRA which came into operation on 11 November 1996 contains provisions that specifically prohibit the discrimination of employees and job applicants.[44] Although not mentioned in s 1 as an express purpose of the Act, the prohibition of discrimination is found as a general theme in the Act and in specific dismissal provisions. Section 187 of the LRA reads as follows:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –
>
> (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
>
> (2) Despite subsection (1)(f)-
>
> (a) a dismissal may be fair if the reason for the dismissal is based on an inherent job requirement of the particular job;
>
> (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

Section 187(2) of the LRA provides the employer with a justification for dismissal based on the inherent job requirement with reference to s 187(1)(f) only. A claim for automatically unfair

[42] 75 of 1997.

[43] n 14 above.

[44] Dupper (n 2) 21.

dismissals based on pregnancy may be brought in terms of s 187(1)(e) which specifically deals with pregnancy or may be brought in terms of s 187(1)(f) as an unlisted ground of discrimination. In the case where the claim is brought on the latter, the employer would have the opportunity to use the defence of the inherent requirement of the job in terms of s 187 (2) (a). However, if the claim is based on pregnancy in terms of s 187(1)(e), then the employer would have to prove that it was fair and dispense with such onus in terms of s 192(2) of the LRA.

2.2.2 The Employment Equity Act

The preamble of the EEA recognizes that apartheid and other discriminatory laws have caused disparities in labour relations and that as a result, groups of disadvantaged people have emerged, and drastic changes have to be made to redress the inequalities that now exist. In this regard, the Act seeks to promote the constitutional right to equality, eliminate unfair discrimination in employment, promote diversity in the workplace and promote economic development and efficiency in the workplace.[45]It is important to note that in terms of s 9 of the Act, employee also refers to an applicant for employment and that the requirements and protections afforded to employees for purposes of s 6, 7 and 8 apply to job applicants. Section 5 of the Act urges employers to take steps to promote equal opportunity and to eliminate unfair discrimination in the workplace. The section places a duty on the employer to ensure that the workplace promotes the values of the Constitution and is in line with the Act. It is clear that to eliminate discrimination, values of the Constitution such as equality have to play a role. With regards to the issue of unfair discrimination in the workplace with reference to the South African labour market, no enquiry is complete without looking at s 6(1) and (2) of the EEA which states;

> " (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
>
> (2) It is not unfair discrimination to-

[45] Preamble of the Employment Equity Act.

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

Section 6 (1) of the EEA is similar to s 187(1)(f) of the LRA in that they both prohibit unfair treatment of employees based on discriminatory grounds. S 6 (1) of the EEA, however, is much wider that s 187(1)(f) of the LRA. In the EEA, pregnancy for example is a listed ground of discrimination in which the employer can use the inherent job requirement to justify its fairness. The EEA also lists more grounds of discrimination than both the Constitution and the LRA. In terms of the EEA, it is also unfair to discriminate an employee based on their HIV status as a listed ground. In the LRA, a dismissal based on ones HIV status would be rendered automatically unfair based on an arbitrary ground.[46] While the LRA provided for the inherent requirements of the job and the retirement age as justifications for automatically unfair dismissals, the EEA provides that only affirmative action measures and the inherent job requirements may be raised as defences to justify unfair discrimination in the workplace.

Affirmative action measures are defined as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories in the workplace of the designated employer.[47] It is clear that based on this definition, an employer can use the defence of affirmative action measures to justify an unfair discrimination claim by alleging that the said employee is not suitably qualified for that particular position. This would mean that the job applicant or employee lacks the academic qualifications, skills or experience required for the performance of that job and that another employee or applicant from a different racial group is better qualified or "suitably qualified" to fill in the position. It is to be noted however that affirmative action does not always apply as a ground of justification. The court in *Robinson v Price Waterhouse Coopers*[48] stated that affirmative action can never be used as a legitimate ground for retrenchment. Based on this, it is evident that there exists a limitation on the instances where the justification can be used.

[46] *Allpass v Mooikloof Estate* (PTY) Ltd 2011 ZALCJHB par 121.

[47] s 15(1) of Act 55 of 1998; See also Employment Equity Amendment Act 47 of 2013.

[48] 2006 5 BLLR 504 (LC) par 22; See also *Thekiso v IBM South Africa (Pty) Ltd* 2007 3 BLLR 253 (LC) par 49.

2.3 The meaning of inherent job requirement

The EEA does not provide for a definition of inherent requirements of the job. The term 'inherent job requirements' originates from the Discrimination (Employment and Occupation) Convention of the ILO.[49]The committee of experts in the ILO have emphasized that there must be strict interpretation of this defence. Any defence in legislation that seeks to justify discrimination also limits the right to equality entrenched in the Constitution and therefore should be applied restrictively.[50]The Industrial Court in *Association of Professional Teacher v Minister of Education* [51] emphasized that this defence should be allowed only in very limited circumstances.

The revised draft code of good practice on the employment of persons with disabilities published in the Government Gazette[52] defines the inherent requirements of the job as those requirements the employer stipulates as necessary for a person to be appointed to the job. It relates to attributes which must relate in an inescapable way to the performance of the job.[53] These are necessary requirements necessary in order to enable an employee to perform the essential functions of that job.[54] It is clear based on this definition, that the discretion to determine what constitutes the inherent job requirements lies with the employer. The code, although not legally binding, and merely a guideline, empowers the employer to establish, based on the needs of the occupation, what qualifications, experience and skills are required. The same notion is expressed in the Public Service Regulations[55]which requires the executing authority to establish a job description, title and inherent job requirements for every post put out.

To better understand what constitutes an inherent job requirement, we must go into an enquiry of what the term itself entails. The term 'inherent' has been defined as a permanent tribute or quality;

[49] No 111 of 1958.

[50] Dupper and Garbers *Employment Discrimination: A Commentary in Thompson and Benjamin, South African Labour Law* (2004).

[51] n 22 above.

[52] GG 38872 (12-06-2015).

[53] Cooper "The boundaries of equality in labour law" 2004 *ILJ* 813.

[54] Item 7.3.2 of the Revised Draft Code of Good Practice on the employment of persons with disabilities.

[55] Public Service Regulations, 2001.

forming an element, especially and essential element of something.[56]A 'job' is defined as the basic duties, tasks, functions, competency requirements and responsibilities to which posts of the same grade are established.[57] Furthermore, the Public Service Regulations define inherent requirements of a job as competencies that, according to evidence, an employee needs to perform that job.[58]This evidence refers to competency certificates and documentation supporting qualifications, training, experience or skills. The inherent requirements of the job are not universal requirements but are those specific to a job and that an employer deems necessary for the performance of the job. A dismissal or discrimination of an employee or job applicant based on these requirements is clearly based on not being up to the standard that the employer requires for that job. Elements of unfairness may be present in such circumstances and the defence is an absolute defence against unfairness.[59]

2.4 Conclusion

The concept of fairness is rooted in our Constitution and is coherent with the notion of equality that is core and foundational to our democracy. The Constitution seeks to protect the rights enshrined in the Bill of Rights and advance human rights. Labour rights are enshrined in the Constitution and are important for the economic development of the country. South Africa, by comparison is still a young democratic country plagued with various political, social and economic challenges including challenges relating to the labour market. The right to fair labour practices as expressed in s 23 suggests that people who are engaged in employment relationships must be treated fairly. This means that they may not be unfairly discriminated against based on various factors already listed. However, national labour legislation provides that where unfair discrimination is raised by an employee, an employer can justify their conduct by raising certain defences in terms of s 187(1)(f) of the LRA and in terms of s 6(2) of the EEA. These defence are not absolute as expressed by the ILO and the Courts in certain instances. One of the defences

[56] Du Toit et al *Labour Relations Law* (4th ed) 569.

[57] n 59 below.

[58] n 48 above.

[59] *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC) 148H.

available in both the LRA and the EEA is the defence of the inherent job requirements which must be interpreted strictly as well.

This chapter has evaluated the concept of equality in terms of both the interim and the current constitution and what discrimination entails in this regard. The Constitution also codifies certain rights in relation to labour law that we looked at, including s 23 which gave birth to our current labour legislation. Two key pieces of legislation were relevant for this chapter, the LRA and the EEA, especially where dealing with discrimination the workplace and the grounds of justification available.

Chapter 3

Judicial intervention

3.1 Interpretation by the Courts

Since the inherent requirements of the job defence first made it into our labour legislation, our courts have battled with coming up with a definitive approach where claims of unfairness, with regards to dismissal and discrimination in the workplace arise. It is still unclear, what constitutes an inherent requirement of a job and the instances where such a defence can be raised. There have been several opportunities, however, where the courts have been able to interpret the meaning and scope of the defence. This chapter will look at three specific cases where the defence had been used and evaluate how the courts approach it. It will also look at some general tests in this regard.

3.1.1 *Department of Correctional Services v Police and Prisons Civil Rights Union*[60]

The respondents in this matter were former male correctional officers who held various positions at Pollsmoor Correctional Facility Prison in Cape Town. The appellant was the Department of Correctional Services, Western Cape. The department had dismissed the respondents in the year 2007 for non-compliance with the department's Dress Code as it related to male hairstyles. All the respondents had grown dreadlocks for various reasons including, religious and cultural reasons. Their dismissal came after they refused to cut their dreadlocks when they were ordered to do so. The respondents then referred the matter to the Labour Court after an attempt for an internal appeal failed.[61]

At the Labour Court, the respondent's primary claim was for the court to declare that their dismissals were automatically unfair in terms of s 187(1)(f) of the LRA and that the department had unfairly discriminated against them directly or indirectly on the basis of religion, conscience, belief, culture and gender as envisaged by the legislative provision. Other alternative claims sought by the respondents included a claim for damages, compensation and reinstatement. With regards

[60] 2013 7 BLLR 639 (SCA).

[61] the *Leonard Dingler* (LC) case (n 59) par 9.

to the primary claim, the LC accepted that indeed the respondents were dismissed because of their dreadlocks and their non-compliance with the instruction of the respondent to cut the dreadlocks. It found that indeed there were cultural and religious reasons for wearing the dreadlocks and that only male officers were subjected to the 'no dreadlocks' rule. The court, however found that the respondents had failed to communicate their beliefs, cultural and religious reasons to the Commissioner who had issued their suspension, and thus had failed to establish a causal link between the prohibited reasons for the dismissal and the circumstances of the dismissal. In this regard, the court found that there was no discrimination, whether direct or indirect on the respondents based on belief, culture or religion. The court held that there was, however, discrimination based on gender because the rules on dreadlocks only applied to male officers. Consequently, the court held that the appellants had failed to rebut unfairness and could not prove that the dismissals were automatically unfair.

The matter then went on appeal at the Labour Appeal Court (LAC). The LAC dismissed the appeal and held that the dismissals were automatically unfair based on religion, culture or belief.

Upon further appeal to the Supreme Court of Appeal (SCA), the appellants argued that the discrimination was justifiable since its purpose was to eliminate the risk posed by placing officers who belong to a religion that promotes criminality; that is the use of dagga, especially in a high risk area like a prison. They argued that dreadlocked or Rastafari officials had a higher risk of being manipulated into illegally bringing dagga into prisons. Regarding the issue of gender discrimination, the appellants held that they were not too concerned about female officials because they were used to wearing long hair and that as concurred in *Prince v President, Cape Town Law Society*[62]that women and children are not involved in the Rastafarian use of dagga.[63]

On the matter of discrimination, the court held that the general rule is that once discrimination has been established on a listed ground, unfairness is then presumed, and the onus then lies on the employer to prove the contrary as per the test in *Harksen v Lane.*[64]Other relevant considerations in this regard include the position of the victim of the discrimination in society, the extent to which

[62] 2002 2 SA 794 (CC).

[63] the *Leonard Dingler* (LC) case (n 59) par 20.

[64] 1998 1 SA 300 (CC) par 48.

the interests and rights of the discrimination victim have been affected, evaluating whether the discrimination has impaired the dignity of the victim[65] and if there are less restrictive means of achieving the purpose of the discrimination.[66]

The SCA applied this test and found that there was not rational connection between the purpose of the discrimination and the measure taken and, in this regard, the department had failed to prove that it would suffer an unreasonable burden if the respondents were to be exempted. It held that the appeal must therefore fail.

3.1.2 *IMATU v City of Cape Town*[67]

The applicant in this matter is the Independent Municipal and Allied Trade Union (IMATU) representing Mr. Murdoch (second applicant), who at the time of the application was employed by the respondent (City of Cape Town). The second applicant was employed as a law enforcement officer by the respondent under the Protection Services Directorate. Later Murdoch requested for an internal transfer from law enforcement to become firefighter under the City. This request was not granted since he had type 1 diabetes and was insulin dependent. IMATU then alleged that the respondent was directly discriminating against Murdoch on the grounds of disability, alternatively, on arbitrary grounds or an analogous unlisted ground being his medical condition.

The respondent argued that there was a blanket ban that prohibited the appointment of applicants in similar positions as Murdoch and that this ban was fair and justifiable based on the inherent job requirements as envisaged in s 6(2) of the EEA. The respondent based its argument further on an assessment that was done by an internal occupational health medical practitioner on Murdoch which concluded that if he were to be appointed as a firefighter, he would pose an unacceptable risk to himself, other employees and the public in general. The practitioner recommended that due to the occupational requirements of the firefighting job, the insulin dependency rendered him medically unsuitable to perform the job.

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[65] n 60 above par 51.

[66] *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 31.

[67] 2005 11 BLLR 1084 (LC).

The Labour Court in dealing with this matter looked at the concept of discrimination under the auspices of section 6 of the EEA. It accepted that the Act prohibited direct and indirect discrimination of employees on listed and unlisted grounds. Furthermore, the court acknowledged that where unfair discrimination is alleged in terms of the section, an employer could raise the inherent requirements of the job as a defence in terms of s 6(2). The onus would rest on the employer as per s 11 of the EEA, which requires that where unfair discrimination is alleged, the employer against whom it is alleged must prove that it is fair. In *Hofman v South African Airways*,[68] it was held that the effect of s 11 is that it creates a rebuttable presumption that once the applicant shows the existence of discrimination, it is assumed to be unfair and the onus then rests on the employer to prove its fairness.[69]

The court then accepted that in this case, the approach with regards to unfair discrimination employed in the *Harksen v Lane*[70]case should be applied. The first enquiry in terms of this approach is whether the provision differentiates between people or a category of people. If it does, is there a rational connection between the differentiation and the legitimate purpose it was designed to achieve. If it doesn't, then there is a violation of the guarantee to equality. The second enquiry asks whether the differentiation amounts to unfair discrimination. To establish this, there is a further two-step approach. The first asks whether the differentiation amounts to discrimination; if it is on a listed ground, then discrimination is established. If it is based on an unspecified ground, then the existence of discrimination would have to be based on an objective test looking at whether it is based on attributes that had the potential to impair the dignity of the person or group or it could adversely affect them in a comparable manner. Secondly, if the differentiation amounted to discrimination, was the discrimination unfair? If on specified grounds, then unfairness is presumed.[71]

The respondent had admitted that it differentiated between Murdoch and other persons in an employment practice or policy based on the fact that he was diabetic and insulin dependent as a

[68] 2000 2 SA 628 (W).

[69] See also *Jooste v Score Supermaket Trading (Pty) Ltd (Minister of Labour Intervening)* 1992 2 SA 1 (CC).

[70] n 62 above.

[71] the *Christian Education* (CC) case (n 66) par 81.

result. However, the respondent argued that the differentiation did not amount to unfair discrimination because there was a rational connection to a legitimate government purpose. It averred that as a government authority, there was a duty to provide fire protection services through fire fighters in terms of the Constitution[72] and the Fire Brigade Services Act.[73] There was also an additional duty in terms of the Occupational Health and Safety Act[74] to provide a safe working environment for its employees as far as is reasonably practical. It therefore could not take a chance on the applicant as this would pose risk not only to the applicant but possibly to other employees and members of the public. Additionally, the respondent wanted to avoid any claim for compensation in cases of injuries under the Compensation for Occupational Injuries and Diseases Act.[75]The court held in this regard that the differentiation can be seen as a legitimate way of ensuring public safety and that there was a rational cause to such objective.[76]

On the second enquiry, the court had to decide whether the differentiation had been on a specified ground in terms of s 6(1) of the EEA being "disability" or whether it was based on an analogous ground such as the applicant's medical condition. The court held that our law did not regard an insulin dependent person as disabled or as having a disability, although it amounted to a certain physical impairment and therefore there was insufficient evidence to prove that the differentiation was on a specified ground. This meant that the applicants needed to show that there was existence of discrimination on an analogous ground based on attributes and/or characteristics having the potential to impair Murdoch's dignity or to adversely affect him in a comparably serious manner that amounts to discrimination. The court was satisfied that Murdoch's condition, type 1 diabetes, was an analogous ground of disability, HIV status, and possibly birth. It impaired his dignity by limiting his capacity to function to the full enjoyment of his rights under s 22 of the Constitution. [77] Considering all these factors, the court held that the blanket ban which prevented the applicant

[72] s 155(6)(a) and (7) of the Constitution.

[73] 99 of 1987.

[74] 85 of 1995.

[75] 130 of 1993.

[76] the *IMATU* (LC) case (n 67) par 87.

[77] the *IMATU* (LC) case (n 67) par 90.

from successfully transferring to the fire protection services directorate amounted to unfair discrimination.[78]

The court accepted that unfair discrimination is justifiable in our law through mainly s 36 of the Constitution, however, the section was not applicable in this case. The relevant defence could be found in s 6(2) of the EEA, the defence of inherent job requirement. In this regard, the court found that the respondent had failed to justify the discrimination. The respondent had based the blanket ban on a general assessment as opposed to an individual assessment of the applicant's circumstances. Murdoch had his condition under control and could perform the duties required. The court ordered that the employment policy of refusing to employ insulin dependent individuals as firefighters amounted to unfair discrimination and that going forward, each applicant must be assessed based on their own merits.

3.1.3 *Whitehead v Woolworths (Pty) Ltd*[79]

The applicant in this matter had been offered a position by Woolworths (the respondent) as a Human Resources Generalist. She accepted the offer but before the agreement could be concluded, the responded repudiated the employment contract by effecting a dismissal. The applicant alleged that the dismissal was unfair as she was unfairly discriminated against on the basis of pregnancy and that in the circumstances, this amounted to unfair labour practices. The applicant argued that the dismissal was automatically unfair in terms of s 187(1)(e) of the LRA which prohibits the dismissal of an employee based on pregnancy, intended pregnancy or pregnancy related reasons. It was therefore important in this matter to determine whether the applicant was indeed an 'employee'. It was not enough that the applicant had concluded a contract of employment because that may give rise to a contractual claim but does not confer the status of employer and employee.

To determine the scope of the employee status, the court looked at the definition of employee in terms of s 213 of the LRA. According to the section, the status of employee is conferred to a person who actually works for another person. The person must have rendered services, excluding those

[78] n 67 above par 91.

[79] 1999 20 ILJ 2133 (LC).

of an independent contractor. Additionally, the person must have received remuneration for the services rendered. The court found the definition in the Act to be unsatisfactory and noted that the Act should cover persons who had finalized employment contracts and afford them some form of protection. However, because the wording in the Act was clear, the court held that the applicant's claim for unfair dismissal must fail.[80]

Turning to the applicant's alternative claim of unfair labour practices in terms of item 2(1)(a) read with 2(2)(a) of schedule 7 to the Act. Item 2(1)(a) prohibits direct or indirect discrimination on arbitrary and listed grounds and item 2(2)(a) definition of an employee includes applicants for employment. Pregnancy is not a listed arbitrary ground in terms of the item, however the grounds listed are not exhaustive and discrimination can be based on other unlisted grounds. The respondent did not dispute the existence of discrimination based on an unlisted arbitrary ground but argued that the discrimination was not unfair because it was based on a requirement of uninterrupted job continuity (for 12 months) which applied equally to any applicant. According to the respondent, this requirement was rationally and commercially justifiable.[81]In this regard, the court could not find any reason why the requirement for uninterrupted continuity was necessary for the position. This requirement was unguaranteeable as it was possible that any employee could have challenges in course of the 12 months that could require them to discontinue their employment duties. This requirement was not objectively justifiable according to the court and the respondent was found to have committed an unfair labour practice and ordered to pay compensation to the applicant.[82]

The matter went on appeal at the LAC[83]where the decision of the court aquo was reversed. Zondo AJP in giving his judgment considered that the appellant had gone ahead to appoint someone else for the position, citing that he was better qualified, experienced and suited than the respondent. The respondent, in Zondo's view could not show that if not for her pregnancy, she would have been appointed for the position despite there being a better candidate than her. Therefore, there

[80] the *Woolworths* (LC) case (n 79) par 16.

[81] the *Woolworths* (LC) case (n 79) par 21.

[82] the *Woolworths* (LC) case (n 79) par 55.

[83] *Woolworths (Pty) Ltd v Whitehead* 2000 6 BLLR 640 (LAC).

was no causal connection to her not being appointed and her pregnancy. Although her pregnancy was taken into consideration when determining whether she should be appointed, but the overriding factor was that there was a stronger candidate which eliminates any element of unfairness.

Conradie JA disputed the validity of the continuity requirement. In his opinion, the appellant did not initially attach much value to the continuity requirement until it was revealed that the respondent was pregnant. The appellant therefore failed to show that the continuity requirement was operationally important, so much so that it would have been unreasonable to expect the appellant to employ the respondent.[84]

Willis JA after evaluating both Conradie JA and Zondo AJP's contributions to the judgment, agreed with the order made by Zondo. He reasoned that there must a exist a balancing of interests in society and in any conflict involving a clash between the notions of freedom and equality. On the one hand, there is an ideal to maximise economic rationality which benefits the economic growth and prosperity of society. On the other hand, there is an ideal to protect the disadvantaged, which includes pregnant women so that we may be closer to reaching the goal of equality between men and women. He expressed that in reaching a decision in this matter, the court would give an imperfect result. He concluded that ignoring the pregnancy of a prospective employee and not considering it as factor for employment purposes may seem fair to the employee but certainly not to the employer and its impact would be devastating to society. The court then upheld the appeal with costs, the order of the court aquo was set aside and substituted.[85]

3.2 Case analysis

It seems there is no standard test that the courts apply in dealing with unfair discrimination claims and where the inherent requirements of the job can be used as a ground of justification. Although there are similar methods and evaluations adopted by the courts in the different scenarios, each case is dealt with based on its own merits. What is unanimous in the cases is that the courts always

[84] the *Woolworths (LAC)* case (n 83) par 48.

[85] the *Woolworths (LAC)* case (n 83) par 151.

go into an enquiry to establish the existence of discrimination. Discrimination of an employee based on a listed ground in legislation is easier to deal with because the onus automatically shifts to the employer. The employer will have to prove that the discrimination is fair by relying on the defences available in legislation, including the defence of the inherent job requirement. In some instances, even before the determination of the existence and extent of discrimination, where it is in dispute, the courts will enquire whether the claimant is in fact an employee. The definition of employee in terms of s 213 of the LRA normally applies. Sometimes, where the definition falls short, the presumption of who is an employee in terms of s 200A may apply.

Once it is determined that the person is an employee or has a claim as job applicant in terms of the EEA, and discrimination is established on a listed ground, the employer must prove on a balance of probabilities, that such discrimination did not take place as alleged or it is rational and not unfair, or otherwise justifiable.[86]If the discrimination is based on an analogous ground, the burden of proof shifts to the complainant who must show on a balance of probabilities that the conduct complained of is not rational and that it amounts to discrimination which is unfair. This is similar to the approach in *Harksen v Lane* (discussed above) which the courts like to reference. Other factors which are not exhaustive that the court considers include, the position of the complainant in society and whether they have been disadvantaged in the past, nature of the discriminating provision and its purpose, extent of the discrimination on the complainant and whether the discrimination has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.[87]

This is the commonly applied test in unfair discrimination claims. Courts rarely go into a deep enquiry into the defences that can be raised against the claim. In these cases, dealing with the defence of inherent job requirement, the courts were more concerned with the existence and non-existence of the discrimination and the impact it may have than the defence raised. Once the court establishes that there is rationality and a legitimate purpose to the discrimination, which rationality sometimes has little to do with the defence in question, the court concludes the matter and makes

[86] s 11(1) of the EEA.

[87] Kruger "Equality and unfair discrimination: refining the *Harksen v Lane* test" 2011 *The South African Law Journal* 479 482.

a finding. The courts seldom dwell into what constitutes an inherent job requirement and whether the requirement itself is a fair requirement. The notion of fairness is only relevant in so far as it speaks to the discrimination but not the defence.

In my opinion, the courts should go beyond determining the fairness and unfairness of merely the discrimination, but more focus, where the defence of inherent job requirement is made, should be on the fairness of the defence itself. There must be an enquiry as to what actually constitutes an inherent job requirement by looking into the relevance and necessity of that requirement to that specific job. Granted, each job will have its own requirements but there must be a thorough enquiry into those requirements, we must ask whether in the absence of those requirements, there can be no performance of the job. And if there can be performance, would it yield similar results as those if the job requirements were met. For example, if it is an inherent job requirement that firefighters must not be diabetics who are insulin dependent, we must ask whether, in the case where this was not a requirement, would the complainant otherwise qualify as a firefighter? And if so, would they perform in a manner that provides similar results to other firefighters who are not diabetic and insulin dependent? If the answer is no, then the requirement can be accepted as fair.

Conclusion

There is still much work to be done to balance the interests of both employees and employers in the employment relationship. Unfortunately, the relationship is inherently unequal with the consequence that employees are the economically weaker parties. Labour legislation offers protection and governs this relationship but is it enough? Are employees shielded from unfair discrimination in the workplace and are the defences available to employees in this regard not further oppressing employees? Employers normally set the standards for employment for advertised positions, including the requirements of the job, is it fair that they can use the same requirements they engineered to justify a claim of unfair discrimination against them? How do we prevent the abuse of the defence by employers?

Chapter 4

An international perspective and lessons from foreign jurisdiction

4.1 Introduction

Our Constitution obliges us to consider international and foreign law when dealing with any matter. Section 232 of the Constitution states that customary international law is law in the Republic unless it is inconsistent with the Constitution. In s 233, the Constitution obliges the courts to prefer any reasonable interpretation of legislation that is consistent with international law. Furthermore, s 39 states that when interpreting the Bill of rights, a court, tribunal or forum must consider international law[88] and may consider foreign law.[89] This chapter is going to look at what are international obligations are with regards to discrimination in the workplace and what guidelines can be found in the International Labour Organisation in this regard. It will also look at foreign jurisdiction as per s 39(1)(c) by analyzing Australian case law dealing with discrimination claims in the workplace and the defences available to employers. A comparative perspective enables us to see through our systemic myths and forces us to face the realities of our own systems.[90]It is therefore necessary to look elsewhere for lessons to be learnt in this regard.[91]

4.2 The International labour organization.

The advent of the new political dispensation in 1994 heralded the coming of a new labour dispensation. Labour relations and labour policies changed significantly from those which prevailed under the previous government.[92] A substantial portion of this transformation is linked to the consideration and application of international standards. Our Constitution is also pro-international standards and insists that we consider international law when enforcing legal rules.

[88] s 39(1)(b) of the Constitution.

[89] s 39(1)(c) of the Constitution.

[90] Simitis "Denationalising labour law: the case of age discrimination" 1994 *Comparative Labour LJ* 321.

[91] Naidu "The inherent job requirement' defence- lessons from abroad" 1998 *SA Merc LJ* 173 174.

[92] Kruger and Tshoose "The impact of the Labour Relations Act on minority trade unions: A South African perspective" 2013 *PELJ* 285 285.

The LRA also recognises the significance of International law and states that it is to be interpreted in compliance with the public international law obligations of the country.[93] One of the main purposes of the LRA[94] is to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation (ILO). The ILO is a specialised agency of the United Nations (UN) which is (amongst other related matters) responsible for developing international labour framework and policies.

4.2.1 Understanding the International Labour Organisation and its relationship with South Africa

In the 1980s, international labour standards informally influenced the Industrial Courts jurisprudence on unfair labour practices.[95] This means that the development of pre-constitutional South African labour laws were indirectly influenced by international standards. In today's constitutional dispensation, it is impossible to understand labour law without applying one's mind to international standards and the institutions that shape it.[96]The relevant institution in this regard is the ILO. The ILO was founded in 1919 by the Treaty of Versailles[97] to demonstrate that world peace can be achievable through social justice. In 1946, the ILO became the first League of Nations' (now the UN) specialised agency. South Africa was (then Union of South Africa) a signatory of the Treaty of Versailles and a member state of the UN. As a member of the UN, South Africa automatically extended its membership to the ILO.

The aim of the ILO was to establish an institution through which international standards (conventions and recommendations) could be adopted to promote conditions that would enable the well-being and development of all human beings and to do so without discriminating on the basis

[93] See s 3 of the LRA.

[94] See s 1 (b) of the LRA.

[95] n 91 above.

[96] Grogan (n 38 above) 23.

[97] A peace treaty that ended World War I.

of race, gender or colour.[98] This is reflected in the Constitution of the ILO[99] where the preamble states: [100]

> "Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required;
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."

The preamble of the ILO's constitution reflected the ILO's mandate and primary objectives and a strong notion of universal social justice and peace. The ILO had a tripartite nature in which representatives of government, workers and employees sit on all committees and structures to further the idea of an international labour agenda.

At the time of the formation of the ILO and drafting of its constitution, South Africa was a country plagued with apartheid.[101]The system's racial policies eventually made their way to the ILO's focal debate point in 1959 and the credentials of the country's delegation where called into question.[102]In 1961, the International Labour Conference adopted a resolution for the withdrawal of South Africa from the ILO due to the government's apartheid policies. The resolution advised the ILO's governing body to withdraw South Africa until it abandons the apartheid policy.[103]Following proposals made calling on the ILO to amend its constitution to specifically provide for suspension and expulsion of member states from the organization and the 1963 decision by the ILO's governing body to appoint a committee to deal with questions concerning South Africa, the South African government in 1964, gave notice of its intention to withdraw from the organization and it so withdrew for 30 years.

[98] Erasmus and Jordaan "South Africa and the ILO: towards a new relationship" 1993/1994 *SAYIL* 65 66.

[99] Constitution of the International Labour Organisation, 1919.

[100] Drafted in 1919 by the labour commission

[101] Lingaas "The crime against humanity of apartheid in a post-apartheid world" 2015 *Oslo Law Review* 86 94.

[102] (n 7 above) 23.

[103] (n 10 above) 71.

During the time of South Africa's withdrawal, many international labour standards were set and once the country rejoined, it ratified most of the standards, including the 8 core standards.

4.2.2 The inherent job requirement according to the ILO

The term 'inherent job requirement' originates from the ILO's Discrimination (Employment and Occupation) Convention.[104]Article 1 of the convention shares similar ideals to s 6 of the EEA and s 187(1)(f) of the LRA. The article prohibits any distinction, exclusion or preference on the bases of race, colour, sex, opinion, national extraction or social origin which has the effect of nullifying or impairing on the equality of opportunity or treatment in the employment.[105]Article 1(2) empowers employers with a defence, stating that it is not discrimination if the distinction, exclusion or preference is based on the inherent requirements of that particular job. The convention does not mention fairness or unfairness as concepts. This is different to our law because fairness forms the basis of any discrimination claim. A complainant, according to South African law may approach the court or the CCMA if they believe they have been unfairly discriminated against based on the grounds listed in legislation or on arbitrary grounds. The first point of departure is determining whether there was discrimination which is unfair. An employer may use the defence of inherent job requirement to justify a claim for 'unfair discrimination' and not merely 'discrimination'. The onus on the employer is to prove that the discrimination was fair, and not to dispute the existence of the discrimination when raising this defence.

This is not the same notion found in the ILO standard. The convention only prohibits discrimination and not unfair discrimination. It seems that based on this approach, an employee may raise a claim for discrimination in the workplace, based on the listed grounds in article 1(a) or other arbitrary grounds in terms of article 1(b) after consultation with employees and employers organisations where relevant. Once there is discrimination alleged, without going into an enquiry into its fairness or unfairness, the employer can raise the defence of inherent job requirement to dispute the existence of discrimination and not the unfairness of it. The convention is an old

[104] n 49 above.

[105] Article 1(a) of the Convention (n 100 above).

standard that needs to keep up with the times. It may not have been relevant to discuss matters of fairness in 1958 but it certainly is in 2019.

4.2.3 Conclusion

The ILO perhaps needs to take notes from South African labour legislation with regards to discrimination in the workplace and how it can be dealt with. Granted, even South African legislation has its shortfalls in this matter, but it provides better protection to the employees than the ILO. The employment relationship requires a balancing of interests and any labour law that seeks to achieve this balance must do so by considering the inherent inequalities that underlie the relationship. The convention offers protection to employees by prohibiting discrimination and promoting equal opportunity and treatment, however, it is also easy for the employer to dispute a claim of discrimination. Firstly, the convention only lists a few grounds upon which discrimination is prohibited, any other grounds may be raised after consultation with other body organizations. It will be difficult, based on this provision to allege discrimination on any other grounds other than the ones listed in the article, which on their own are very limiting. Secondly, the convention does not define what an inherent job requirement is. This is problematic because it is left to the employer to decide, which gives such employer even more power in a relationship where they are inherently in a position of power. The convention must be amended to include discrimination on more grounds such as sexual orientation, marital status, age, pregnancy, gender, HIV status etc. These are grounds that speak to current crisis in the workplace and the forms of discrimination that employees face. The convention must also include a requirement of fairness, that discrimination may only be justifiable if it is deemed fair. It will not suffice that there merely be discrimination, but there must be unfair discrimination which the employer must justify as being fair.

4.3 *Lessons from foreign jurisdiction*

4.3.1 Introduction

As foreign approaches are employed in South African case law to try and interpret the concept of inherent job requirement. It is useful to briefly look at some available foreign case law.[106]This part of the comparative chapter will look at Australian law, particularly case law dealing with discrimination and the inherent job requirement as a defence. Some parts of Australian legislation will also be looked at.

4.3.2 Legislative provisions under Australian law

The inherent job requirement in Australia is dealt with in the Disability Discrimination Act.[107]Section 21A(1) of the Act does not make it unlawful for a discriminator (employer) to discriminate against an aggrieved person (employees) on the ground of disability of the aggrieved if the discrimination relates to certain work[108] and; because of such disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work even if the employer made adjustments for the aggrieved person.[109]Other factors such as the aggrieved person's training, qualifications, experience, performance in the job, and other reasonable factors are taken into account.[110]Furthermore, the Act does not consider it unlawful to discriminate against a person on the ground of disability if avoiding that disability would impose an unjustifiable hardship on the discriminator.[111]The Workplace Relations Act[112]encourages the prevention and elimination of discrimination on the grounds of sex, race, colour, sexual preference, age, physical or mental

[106] McGregor "The inherent requirements of a job as a justification for discrimination" 2002 *Juta's Business Law* 171.

[107] 135 of 1992.

[108] s 21A(1)(a) of the Disability Discrimination Act.

[109] s 21A(1)(b) of the Disability Discrimination Act.

[110] s 21A (2) of the Disability Discrimination Act.

[111] s 21B of the Disability Discrimination Act.

[112] 86 of 1988 as amended.

disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[113]

Australian labour legislation, like the Workplace Relations Act (WRA) embodies similar notions of anti-discrimination as South African legislation like the LRA and the EEA. These pieces of legislation prohibit discrimination based on similar grounds. The EEA and the LRA list more grounds than the WRA. The WRA does not specifically mention HIV status as a ground of discrimination but could be an arbitrary ground on the basis of physical disability, which is a listed ground in the Act. It is quite progressive that the WRA lists mental disability as one of the grounds upon which discrimination is prohibited. No such ground exists in the South African context even though one third of all South Africans have mental illness.[114]Maybe it is also time that mental health and/or mental disability be expressly listed in the EEA and LRA.

The legislation in Australia speaks of unlawfulness whereas in South Africa, we are concerned with unfairness when it comes to labour relations. We do not speak of unlawful dismissals, unlawful discrimination or unlawful labour practices but the test is that of fairness. Looking at the LRA as the principle labour legislation in South Africa which regulates various labour matters including unfair dismissals. When a complainant alleges unlawful dismissal, that will fall outside the scope of the LRA and may have to be dealt with using common law remedies. However, when unfair dismissal is alleged, the courts will look at remedies in the LRA for any LRA breach.[115]The absence of any reference to unlawfulness in this regard is telling, it suggests that if a complainant wishes to raise unlawfulness of a dismissal in the LRA for example, they must categorize it as an unfair dismissal.[116]

The Disability Discrimination Act makes it clear that it is not unlawful to exclude a person from employment based on their disability if they cannot perform the tasks required even after an employer has made adjustments for the aggrieved person. This is the principle of reasonable accommodation. It requires employers to take positive steps to modify the working environment

[113] (n 112 above) at s104.

[114] *Sunday Times* (06-07-2014) 1.

[115] *Steenkamp v Edcon Limited* 2019 ZACC 17 par 76.

[116] *James and another v Eskom Holdings SOC Ltd* 2017 38 ILJ 2269 (LAC) par 107.

or job to enable a prospective employee or existing employee who has a protected attribute such as a disability tom comply with the requirements of the job.[117] This duty is not explicitly implied in s 6 of the EEA when dealing with discrimination. However, s 2 of the EEA imposes a duty on employers to promote equal opportunity in the workplace through the elimination of unfair discrimination. Promoting equal opportunity must include taking measures to reasonably accommodate employees who do not meet the inherent requirements of a job because of a protected characteristic.

4.3.3 Relevant case law

4.3.3.1 *Qantas Airways Ltd v Christie*[118]

The respondent is Mr. Christie (Christie) was employed by the appellant, Qantas Airlines Limited as a captain on international flights from 1964 until 1994. He was discharged of his employment in accordance with the respondent's policy known as Rule 60 which required that pilots may not continue to be in service after the age of 60. Christie then commenced proceedings in the Industrial Relations Court of Australia alleging that the termination of his employment was in breach of s 170DF(1)(f) of the Industrial Relations Act (the Act)[119] and he sought reinstatement and compensation as remedies.

Section 170DE (1) of the Act prohibited an employer from terminating an employee's contract without valid reason(s). It held that a valid reason for termination of the employment contract must relate to the employee's conduct, capacity or the employer's operational requirements. The Act also prohibited the termination of an employment contract on certain grounds including age,[120]however, it also held that these grounds can also be reason for the termination of employment if based on the inherent requirements of the position.[121]At all stages of the

[117] Klinch et al *Employment Equity Law* (2001) 7-3.

[118] 1998 193 CLR 280.

[119] 86 of 1988 now the Workplace Relations Ac 1996.

[120] s 170DF(1)(F) of the Act (n 119 above).

[121] s 170DF (2) of the Act (n 119 above).

proceedings, it was accepted that Christie's age was the reason for the termination, or at least it was one of the reasons. Qantas argued that it did not terminate the respondent's employment contract but rather that his employment came to an end through the effluxion of time which was in terms of his contract.

Gray J sitting in the full bench took the view that an inherent requirement should be something essential to the position rather than something imposed on it. On the same bench, Marshall J was of the view that the term 'inherent requirements' must apply where there is a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the 'discrimination' which disqualifies the person from being able to perform the tasks required in the specific position. The court held that the expression should be construed narrowly because it is an exception to the prohibition on termination on discriminatory grounds and that a broad interpretation would be in contravention of the purpose of legislation to prevent discriminatory conduct.

The Court held that the requirements of the particular position relied upon had to be inherent in that they must involve permanent features of the position and not features that vary in time and place. It was held that "the age of sixty" could not be described as "permanent". The evidence showed that the retirement age for Qantas pilots had varied over time, including by the increase from 55 to 60 years during Captain Christie's service.

4.3.3.2 *X v The Commonwealth of Australia*[122]

The appellant in this matter is X, who in 1993 enlisted in the Australian Regular Army. Prior to his enlistment, X had acknowledged that he would undergo medical testing for HIV, and Hepatitis B and C post entry and that if he tested positive to any of the three conditions, he would be discharged of his duties in the army.[123]Once he was recruited, he began his training which included drill and physical training. Shortly after the commencement of training, he was given a blood test which he tested HIV positive for.[124]He was then discharged of his duties in accordance with a

[122] 1999 HCA 63.

[123] (n 122 above) par 11.

[124] (n 122 above) par 12.

Policy established in 1989 called the Policy for the Detection, Prevention and Administrative Management of HIV infection.[125]

Following his discharge, X lodged a complaint with the Human Rights and Equal Opportunity Commission in accordance with s15 of the Disability Discrimination Act which prohibits discrimination in employment unless based on the inherent requirements of the job. X alleged that his discharge from the army upon testing HIV positive amounted to unlawful discrimination.[126] At the Commission's enquiry, the commonwealth did not contend that X was unable to carry out the inherent requirements of being a soldier within the constrains of s 15 because he was physically unable, due to his medical condition, to dispense with his duties. Evidence provided by medical professionals showed that X was at a stage of HIV infection where he did not suffer from any ill effects or symptoms and was in excellent health thereof. The Commonwealth instead argued that X posed the risk of infecting other soldiers.[127]

The commissioner held in favour of X and substantiated that X had been unlawful dismissed from the Army.

Dissatisfied with the commissioner's finding, the Commonwealth applied to the full court of the Federal court. The court held that inherent requirements of employment could include factors other than the employee's physical ability to carry out the tasks required but it involves considerations of health and safety issues of others. The court found it necessary to assess whether this would pose a real risk to others. It recommended some factors that the commissioner would have had to consider, including, the degree of risk, consequences of the risk being realized, the employer's legal obligation to co-employees and others, the function performed by the employee in the employer's business and the organization of the employer's undertaking.[128]The matter was remitted to the Commission for further determination.

[125] (n 122 above) par 13.

[126] (n 122 above) par 14.

[127] (n 122 above) par 15.

[128] (n 122 above) par 43.

By special leave, X then appealed the matter to the High Court of Australia. Considering all the facts above, the court found that the commissioner did not make an error in law. It found that the military has frequently enforced universal and discriminatory policies under the auspices that they are essential to the discharge of their mission.[129] Most of these policies are found by the courts to be unnecessary and inflexible. The universal exclusion of recruits on the grounds of HIV is one such example.[130]

The court held that the matter should be remitted to the commissioner for an order. The decisions of the Full Court and the Federal Court were set aside, and the appeal was allowed with costs.[131]

4.4 Case analysis

There are conflicting views amongst judges even in Australia on how to deal with the issue of discrimination in the workplace and whether it can be justified on the basis on inherent job requirement. Looking at both judgments, the courts have agreed that an inherent requirement of a job must be a characteristic that is essential to the performance of the job. They contend that performing the tasks and skills required for a particular job is not limited to the physical ability of an applicant or an employee but whether, by ignoring, the characteristic, condition or attribute that disqualifies them from the job, they would be inadvertently jeopardizing the safety of other employees and the general public. In the *Christie* judgment, the nature of the job involved close interaction with the general public, and their safety depended heavily on his ability to perform the job. As a pilot, he would be responsible for the safety of the passengers and if he could no longer perform his duties as pilot, his passengers would be in danger. It is the balancing of personal interests of the aggrieved and the interests of others that raises contention. In this case, Christie was alleging that he had been unlawful dismissed based on age as he had reached the retirement age as per company policy. It was his argument that his age did not prevent him from flying aircrafts to international destinations, despite being over 60 years old. Although the company had

[129] (n 122 above) par 167.

[130] (n 122 above) par 168.

[131] (n 122 above) par 169.

tried to accommodate him by limiting the places, he could fly to only short distance flights, his argument was that this made him financially weaker as there was more money in flying internationally. Nonetheless, the court held that he was not able to fulfill the inherent requirements of the job even though he was physically fit.

Although general rules apply as found in the Australian labour legislation, the courts apply a case by case assessment to determine each case. In the X v Commonwealth judgment, the courts also considered the risk Mr. X (X) would pose to other employees as an HIV positive military recruit. Again, a balancing of interests had to be considered. The Commission, Full Court, Federal Court and the High Court were not unanimous in their decisions. The Commission found that it was unlawful to discharge X from his duties as he was in great health and his HIV infection did not cause any ill effects, nor did it prevent him from executing his duties. The Full Court at the Federal Court disagreed with the commission and held that he posed a risk to other soldiers and that the international obligations of the army, which required them to discharge any HIV positive soldier from service bound them. The appeal court agreed with the Commissioner and found that although there are other factors other than one's physical ability to perform the tasks required, this requirement was discriminatory and unnecessary. The court found in favour of X.

The circumstances surrounding these cases are different and the grounds upon which the aggrieved persons alleged discrimination are also different. The cases were dealt with based on their own merits. The same rule applies in South Africa, in that there is no universal way of dealing with discrimination cases, although a general test may be followed. The outcomes always depend on the circumstances of that case. Another common thing is that both South Africa and Australia do not have a definition in its labour legislation of what inherent job requirements are. They depend on the job, tasks and skills required and this is determined on a case by case assessment.

4.5 Conclusion

There are a few lessons to be learnt from Australia but there are also some that Australia can learn from South Africa. Firstly, Australian legislation specifically requires employers to take reasonable steps towards accommodating employees and prospective employees with disability in the workplace. A dismissal based on disability will only be unlawful if the employee failed to

perform the tasks inherent to the job despite there being measures in place to accommodate them. This is not an explicit requirement in South Africa. Although disability discrimination is prohibited in the Constitution and in labour legislation, there is no legislative duty to provide reasonable accommodation. Such provision is only found in the Code of Good Practice on the Employment of Persons with Disabilities. The code states that employers should reasonably accommodate persons with disabilities to reduce the impairment of the person's dignity to fulfil the essential functions of the job.[132]It also empowers employers to consider the cost-effectiveness of implementing these accommodative measures. The shortfall, however, is that the code is not binding on employers and is merely a guideline which they 'may' choose to follow. To address this, the LRA and the EEA can be amended to impose a duty of the reasonable accommodation as envisaged in the code.

Secondly, in South Africa there are more listed grounds of discrimination than in Australia. As discussed above for example, HIV status is not a listed ground in Australian legislation, however, in the X v Commonwealth case, the discrimination was based on HIV status. Of course, some of the grounds like language, which we have in South Africa may not seem applicable in the Australian context where over 80% of the population speaks English.[133]Due consideration must be had to a variety of grounds that are relevant to today's global society that is characterized by diversity among other things.

With regards to how Australian courts deal with employment discrimination matters, compared to South African courts, there are similarities and there are differences. The two Australian cases

[132] Item 6.3 of the Code.

[133] Sawe "What languages are spoken in Australia" 2018 *WorldAtlas* (http: www.worldatlas.com/articles/what-languages-are-spoken-in-australia.html (30-10-2019)).

discussed above were dealing with unlawful dismissal, or discharge and unlawful discrimination. In South Africa, we deal with the unfairness of the matter and not the unlawfulness, although the two concepts seem to have similar meanings in the employment relations scope. In South Africa the courts also first determine if there was discrimination using the approach in the *Harksen v Lane*[134]case, or where based on a listed ground, shift the ouns to the employee. In Australia, the courts do not go into an enquiry about the discrimination itself, even where it was not on a listed ground, for example HIV status. The courts assume the existence of a discrimination once it is alleged and so the enquiry is based on the lawfulness or unlawfulness thereof. Similarly, there is an enquiry into the fairness of a discrimination in South Africa, because not all discrimination is unfair, however, this enquiry is a secondary one. Discrimination is not automatically assumed once allege but may be reduced to a mere differentiation.

The approach adopted by South African courts is more intensive and scrutinizes the allegations more. The issue lies in the determination of the inherent job requirements as there is no enquiry into the fairness of the requirement itself. Whereas, in Australia, the courts will also look at the unlawfulness of the requirement.

[134] n 64 above.

Chapter 5

Recommendations and Conclusion

There is no universally adopted approach to deal with discrimination in the workplace. Discrimination is can take different forms and can often have negative impacts on those it is intended to. In the workplace, there must be systems and measures in place to address issues of discrimination, this can be in the form of internal company or organization policies that make provision for the reporting of discrimination and the procedure to be followed when discrimination is alleged. Additionally, these policies must be in line with the Constitution and relevant labour legislation. It is important that workplaces are safe environments free from any form of discrimination, especially discrimination that is unfair and unjustifiable. Strict enforcement of anti-discriminatory laws and rules could be useful in ensuring that employees and prospective employees are shielded.

The South African Constitutional and legislative framework allows an aggrieved employee or prospective employee to bring forth a claim for discrimination in the workplace by relying on the Labour Relations Act if the discrimination led to a dismissal and through the Employment Equity Act. The CCMA, and the specialized labour courts have often use the enquiry as established in the *Harksen v Lane*[135] case to determine the extent of the claim and if it was mere differentiation or discrimination which is unfair. This is coupled by other factors already discussed. There are different approaches when the alleged discrimination is based on a listed or unlisted ground in legislation and this affects the burden of proof. In South Africa, we are concerned with the fairness or unfairness thereof of the alleged discrimination, and is where the defences come in. An employer can use defences such as age, affirmative action measures and the inherent job requirement to justify a claim of unfair discrimination.

In this study, we have looked at the origins of the inherent job requirement and scrutinized its possible meaning and application. There is no definition in South African labour legislation, and

[135] n 64 above.

we accepted that a strict application approach is to be followed in this regard. The courts have had the opportunity to deal with cases where claims of discrimination had been brought forward and where the employer relied on the defence of inherent job requirement. The court's approach is focused on the fairness of the discrimination and not the defence raised, however, maybe it is time to consider legal reform to provide for a scrutiny of the defence itself. We need to establish whether the set 'inherent job requirements' are fair and otherwise reasonable in the circumstances. It is possible that employers will use the these 'inherent requirements of the job' to perpetuate further discrimination that can indirectly discriminate on a group or categories of people. For example, an employer can establish that it is a requirement that a prospective employee have their own car for an entry level position. However, upon close evaluation, this requirement has the potential to exclude a category of people, particularly Black people, who, because of their disadvantaged background, would not have been able to afford or have a car before exiting tertiary in order to qualify for an entry level job position that requires one to have their own car. Essentially, the employer would have disguised discrimination based on race, ethnicity or even social origin by labeling it as an inherent job requirement.

This study considered the regulation of this defence in Australia and found that they are concerned with the lawfulness or otherwise unlawfulness of the discrimination. This is in contrast with the South African approach which focuses on fairness. However, the scope for discrimination is much wider in South Africa than in Australia, for example, there are more listed grounds of discrimination in South Africa than in Australia. This could be influenced by the fact that South Africa comes from a history of discrimination and this is one of the ways to redress the imbalances of the past.

There is still a long way to go to ensure that discrimination is minimized in the workplace. South Africa, through the EEA and the LRA has addressed many of the challenges faced by employees and has tried to balance the interests of both employer and employee. There is no perfect balance because the employment relationship is inherently unequal however, both parties can rely on legislation and the Constitution for the enforcement of their rights.

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